Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MARK J. GARDNER,

Petitioner,

v.

OFFICE OF DISCIPLINARY COUNSEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Disciplinary Rule 8-102(B), as authoritatively interpreted by the Supreme Court of Ohio in *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St. 3d 416 (2003), violates the First and Fourteenth Amendments of the United States Constitution?

2. Whether Petitioner's rights under the First and Fourteenth Amendments of the United States Constitution were violated when his license to practice law was suspended for an alleged violation of Disciplinary Rule 8-102(B)?

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OPINION BELOW

Petitioner seeks review of the Ohio Supreme Court's opinion reported at *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St. 3d 416 (2003), and reproduced at Appendix A.

STATEMENT OF JURISDICTION

On August 13, 2003, the Ohio Supreme Court issued an opinion and order suspending Petitioner Mark Gardner's license to practice law in the State of Ohio. (Appendix A). On August 21, 2003, Petitioner timely filed a motion for reconsideration and a new hearing. On October 8, 2003, the Ohio Supreme Court denied Petitioner's motion for reconsideration. (Appendix C). Petitioner evokes the Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The First and Fourteenth Amendments of the Constitution of the United States of America:

> Amendment I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DR 8-102. STATEMENTS CONCERNING JUDGES AND OTHER ADJUDICATORY OFFICERS.

* * *

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory office.

* * * *

STATEMENT OF THE CASE

Petitioner Mark Gardner is an attorney. On August 13, 2003, the Ohio Supreme Court suspended Petitioner's license to practice law in the State of Ohio for accusations he made about three appellate judges while representing Matthew Cirino.[1]

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1. *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St. 3d 416 (2003) (Appendix A).

Mr. Cirino was convicted of driving his car in violation of a court ordered license suspension.[2] Mr. Cirino appealed his conviction to the Eighth District Court of Appeals of Ohio. Petitioner argued that Mr. Cirino's conviction was unlawful and had to be reversed because Mr. Cirino had never been charged with driving his car in violation of a court ordered suspension. The prosecutor conceded that Mr. Cirino had been charged with a different crime, driving in violation of a financial responsibility act ("FRA") license suspension.

The court of appeals affirmed Mr. Cirino's conviction. In its opinion, the court of appeals failed to mention the prosecution's concession that Mr. Cirino had been charged with a different crime. But the court of appeals quoted Petitioner for the proposition that his client would have been guilty of driving in violation of a court ordered suspension had he been charged with that crime.

Petitioner filed a motion for reconsideration in the court of appeals detailing the court of appeals' error.[3] The motion

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2. *City of Lakewood v. Cirino*, 2001 WL 91225, *1 (8th Dist. 2001).

3. More specifically, Ohio law is clear that a defendant cannot be convicted of a crime not identified in the traffic ticket. *City of Cleveland v. Kimball*, 1999 Ohio App. LEXIS 1999, *3-4 (8th Dist. 1999). Petitioner argued that Mr. Cirino could not be convicted of driving while under a court ordered suspension because he was only ticketed for driving in violation of an FRA suspension. The court of appeals rejected this argument, finding "[t]he mere fact that the ticket also included *the dates of the purported FRA suspension* did not prohibit the trial court from finding the appellant guilty of violating his court ordered license suspension[.]" *City of Lakewood v. Cirino*, 2001 WL 91225, *1. However, the ticket did not merely include

(Cont'd)

for reconsideration also accused the appellate judges of prosecutorial "bias" and "dishonesty."[4] The court of appeals denied the motion for reconsideration.

After denying the motion for reconsideration, one of the appellate judges, The Honorable Judge Michael Corrigan, sent a copy of Petitioner's motion for reconsideration to Ohio Disciplinary Counsel for review. Disciplinary Counsel charged Petitioner with four ethical violations based solely upon the content of the motion for reconsideration: (1) engaging in discourteous conduct degrading to the tribunal in violation of DR 7-106; (2) engaging in conduct reflecting upon his fitness to practice law in violation of DR 1-102(A)(5); (3) interfering with the proper administration of justice in violation of DR 1-102(A)(6); and (4) knowingly making a false accusation against a judge in violation of DR 8-102(B).[5]

Petitioner steadfastly refused to admit that he had knowingly made a false accusation against a judge. A three attorney panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board") held an evidentiary hearing to determine whether Petitioner

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(Cont'd)
"the dates of the FRA suspension." Rather, the dates of the FRA suspension were written in a pre-printed line on the ticket labeled "*suspension type*." (Appendix D, Motion for Reconsideration).

4. Motion for Reconsideration, p. 1, Appendix D.

5. Disciplinary Counsel *withdrew* the charges relating to Petitioner's alleged unfitness to practice law and interference with the proper administration of justice. There was no evidence to support either of those charges. Petitioner stipulated that he had been discourteous.

had "knowingly made a false accusation against a judge." DR 8-102(B). Petitioner was the only witness who testified at the disciplinary hearing. Petitioner testified that he and his client honestly believed that the appellate court judges had ignored the law and skewed the facts, wrote a dishonest opinion, and unjustly affirmed his client's conviction. Petitioner also expressed his view that the appellate judges were biased in favor of the prosecution. Petitioner explained in detail the legal and factual basis for his accusations.

The Board determined that Disciplinary Counsel had proven by clear and convincing evidence that Petitioner knowingly made a false accusation about a judge in violation of DR 8-102(B). The Board recommended that Petitioner be publicly reprimanded and suspended from the practice of law for a period of six months, with all six months stayed on the condition of no further violations. But the Board failed to identify any specific false accusation (although it listed all of the claimed offending statements), the rationale for its finding, or what standard it applied in concluding that Respondent had "knowingly" made a false accusation against a judge. (Reproduced at Appendix B). No court in Ohio had ever addressed the legal standard by which an attorney could be sanctioned under DR 8-102(B).

Petitioner filed objections to the Board's findings of fact and recommendations in the Ohio Supreme Court. Petitioner argued that he could not be sanctioned for "knowingly making a false accusation against a judge" because he honestly and sincerely believed that all of the accusations he and his client made were true. Petitioner further argued that imposition of the Board's recommended sanction would violate his rights under the First and Fourteenth Amendments of the United States Constitution.

On August 13, 2003, the Ohio Supreme Court found that Petitioner had knowingly made a false accusation against a judge and suspended his license to practice law in the State of Ohio. (Appendix A). The Ohio Supreme Court did not find that Petitioner actually "knew" that his accusations were false. The Ohio Supreme Court explained that the sincerity of Petitioner's beliefs and his state of mind when making the accusations were wholly irrelevant: "we hold that an attorney may be sanctioned for making accusations of judicial impropriety *that a reasonable attorney would believe are false*." *Gardner*, 99 Ohio St. 3d at 423 (Appendix A) (emphasis supplied). The Ohio Supreme Court rejected the "actual malice" standard adopted by the Court in *New York Times v. Sullivan*, explaining that its "reasonable attorney" standard was justified in order to promote the "state's compelling interest in preserving public confidence in the judiciary[.]" *Id.* at 432.

Petitioner moved the Ohio Supreme Court for reconsideration and a new hearing. Among other arguments, Petitioner claimed that he was entitled to a new hearing under the Fourteenth Amendment of the United States Constitution in light of the new standard adopted by the Ohio Supreme Court. On October 8, 2003, the Ohio Supreme Court denied Petitioner's motion for reconsideration and a new hearing. (Appendix C).

REASONS FOR GRANTING THE PETITION

Review of the Ohio Supreme Court's decision in *Office of Disciplinary Counsel v. Gardner* is warranted in order to resolve an important constitutional question that the Court has not squarely addressed. In *In re Sawyer*, 360 U.S. 622, 635 (1959), the Court recognized that "the public

attribution of honest error to the judiciary is not cause for professional discipline in this country." However, the Court has never authoritatively determined whether and under what circumstances, if any, a State can discipline an attorney for publicly accusing a judge of official misconduct.

Courts make errors. We want to believe that all of these errors are the result of honest mistakes. But sometimes improper biases or other misconduct cause erroneous and unjust decisions. The public undoubtedly has the right to hear allegations of judicial misconduct. In Ohio, judges are elected. The free expression of ideas is essential to the electoral process. Elected government officials should not be shielded from criticism or accusations of misconduct. Of course, attorneys are in the best position to inform the public about the conduct of judges given their education, training and constant dealings with the courts. Hence, unduly chilling or suppressing the free speech rights of attorneys shields the judiciary from effective criticism to the detriment of the public and the electoral process. Attorneys must be given sufficient latitude to make accusations of judicial misconduct. Attorneys must also be given a clear and narrowly tailored standard to determine the acceptable bounds of judicial criticism under the First Amendment. Accordingly, the determination of whether and under what circumstances, if any, an attorney may be disciplined by a State for accusing a judge of official misconduct is an important constitutional issue that is worthy of the Court's review.

The "reasonable attorney" standard adopted by the Ohio Supreme Court chills speech critical of the judiciary that is unquestionably protected under the First and Fourteenth Amendments because it is impermissibly vague and overbroad.

Moreover, the "reasonable attorney" standard is not narrowly tailored to meet a compelling state interest. No State should be allowed to suppress political speech in order to preserve the public's confidence in any branch of the government, including the judiciary.

In addition, states courts have adopted a number of different tests to answer this important First Amendment issue. Like the "reasonable attorney" standard adopted by the Ohio Supreme Court, the majority of these state and federal court standards refuse to consider the sincerity of the speaker's beliefs, and reject in whole or in part the "actual malice" standard adopted by the Court in *New York Times v. Sullivan*.

For any and all of these reasons, an authoritative answer from this Court is warranted in order to prevent the continued suppression of attorney speech about matters of significant public concern.

The need for review is especially important in this case given Petitioner's role as defense counsel:

> The Framers of our Constitution knew that without someone to remind the system of its paramount dedication to the rule of law and human dignity, liberty would exist only at state sufferance. The Constitution thus preserves an important role for defense attorneys, who . . . must constantly goad the state to do the right thing.[6]

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6. Charles N. Sevilla, *The Role of Lawyers and The Search for Truth in the Criminal Justice System: Criminal Defense Lawyers and the Search for Truth*, 20 *Harvard J.L. & Public Policy* 519 (1997), p. 523.

Petitioner's license to practice law was suspended because he bravely spoke out against the judges who he genuinely believed had issued a dishonest opinion. A free society does not punish it citizens for doing what Petitioner did, even if they are an attorney.

I. Review Is Warranted Because The "Reasonable Attorney" Standard Adopted By The Ohio Supreme Court Chills Constitutionally Protected Speech Of Attorneys And Their Clients

Speech critical of public officials, including judges, is undeniably entitled to the most stringent protections under the First and Fourteenth Amendments of the United States Constitution. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-35 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."); *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 490 (1988) (O'Conner, J., dissenting) ("Political speech, we have often noted, is at the core of the First Amendment").[7]

As discussed below, the "reasonable attorney " standard adopted by the *Gardner* Court will suppress constitutionally protected criticism of the judiciary because it is impermissibly vague and overbroad. *Gardner*, 99 Ohio St. 3d 416 at 423.

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7. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government").

A. The "Reasonable Attorney" Standard Chills Constitutionally Protected Speech Because It Is Vague

> Vague laws offend several important values. First, . . . [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (footnotes omitted.).

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). When a vague statute "abut[s] upon sensitive areas of First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." *Id.* at 109. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.*

The "reasonable attorney" standard offends all of the constitutional values underlying the vagueness doctrine. There is no clear explanation of the standard in *Gardner*. Reasonable attorneys often disagree. In the instant case, The Honorable Judge Kenneth R. Spanagel, Parma Ohio Municipal Court, provided Disciplinary Counsel with a letter in support of Petitioner's character wherein he expressed his belief that the court of appeals had erred in affirming Mr. Cirino's conviction:

> As a 15 year Judge with experience in traffic law, a teacher of traffic laws across the State and as

> one of the primary designers of the UTT Ticket Form, which was the prime subject of the Appellate case, I think that I am highly knowledgeable as to the facts of the Appellate Case. I have read the Decision, even before any disciplinary proceedings were commenced. Although I am restricted in my own ability to comment as to Judicial Decisions, it is my personal opinion that the Decision made by the Court of Appeals was wrong and I certainly would, at a minimum, have written a strong dissent. This is not to either praise or condemn Mark for the language of his Motion; I realize the Members of the Board of Commissioners must focus more on Mark's conduct as opposed to the underlying reason for the conduct, but I would suggest that the Board might first look at the original case, the Appellate Decision, and perhaps examine the law themselves as to whether or not they feel the Appellate Decision was correct. I think this may be important to give the members of the Board some perspective as to where Mark stood as a lawyer. (Appendix E).

Further, the standard adopted by the *Gardner* Court is based upon the subjective determinations of elected state court judges, who are considering the reasonableness of accusations of official misconduct levied against other elected judges. The potential for discriminatory enforcement of the "reasonable attorney" standard is present. In the instance case, there was no expert testimony from which the beliefs of a "reasonable attorney" could be determined. Disciplinary Counsel offered no evidence concerning the correctness of the decision in *Cirino* and the reasonableness of Petitioner's

accusations that the appellate court had acted dishonestly other than his subjective beliefs. Based upon this record, the Supreme Court found that Petitioner had violated the "reasonable attorney" standard without an additional evidentiary hearing under the new standard. *Gardner*, 99 Ohio St. 3d at 424 ("we have reviewed the court of appeals' opinion for evidence of bias and corruption and see nothing that could possibly be characterized as anything other than error, if that.") (Appendix A). Indeed, after announcing the "reasonable attorney" standard, the Ohio Supreme Court denied Petitioner's motion to remand the matter for further hearings based upon the new standard. (Appendix C).

B. The "Reasonable Attorney" Standard Chills Constitutionally Protected Speech Because It Is Overbroad

An overbroad regulation offends the constitutional principle that a governmental purpose to control or prevent activities subject to state regulation may not be achieved by means which "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler v. Koota*, 389 U.S. 241, 250 (1967). Hence, a regulation is overbroad if it prohibits constitutionally protected speech, even if its terms are clear and precise. *Aptheker v. Secretary of State*, 378 U.S. 500, 508-09 (1964). These same principles apply to attorney speech. *Gentile*, 501 U.S. at 1034 ("[O]ur cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that the First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.").

The standard adopted by the *Gardner* Court prohibits constitutionally protected speech in at least four constitutionally significant ways. First, truthful accusations of judicial misconduct can never be abridged by any state law. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned" even if the speaker is an attorney). The *Gardner* standard impermissibly prohibits truthful criticism of the judiciary when "a reasonable attorney" would believe that the criticism is false. *Gardner*, 99 Ohio St. 3d 416 at 423. In other words, an attorney may be sanctioned in Ohio for telling the truth if a "reasonable attorney" would believe that the statements are false.

A public censure for professional misconduct serves to discredit the censured attorney as well as his beliefs. In its opinion, the Ohio Supreme Court explained that even a first violation of DR 8-102(B) requires a "an actual suspension from the practice of law." *Gardner*, 99 Ohio St. 3d 416 at 424. Repeated violations will lead to permanent disbarment. Given this clear admonition, an attorney who is aware of what he honestly and genuinely believes is official misconduct will surely be deterred from speaking out when faced with the possibility of losing his license to practice law because a "reasonable attorney" would reach a different conclusion. The Court should grant this petition to ensure that truthful accusations of judicial misconduct are not suppressed by an overbroad standard regulating speech which, by its express terms, penalizes truthful accusations of judicial misconduct.

Second, negligently made false accusations of judicial misconduct have constitutional value and merit protection

under the First Amendment. *See, e.g., New York Times v. Sullivan*, 376 U.S. at 272 ("Cases which impose liability for erroneous reports of political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors"). Accordingly, state laws having the potential to suppress negligently made accusations of judicial misconduct remove important and valuable speech from the market place of ideas, even though those ideas may be false. *Id.*

The standard adopted by the Ohio Supreme Court punishes false accusations of judicial misconduct that are negligently made in violation of the First Amendment. *Gardner*, 99 Ohio St. 3d 416 at 423 (imposing sanctions based upon a "reasonable attorney" negligence standard). The Ohio Supreme Court justified the negligence standard based upon the premise that attorneys have a duty to "be certain" that there accusations of judicial misconduct are correct. *Gardner*, 99 Ohio at. 3d at 424. However, in *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964), the Court explained that "[a] rule compelling the critic of official misconduct to guarantee the truth of all of his factual assertions . . . leads to comparable self-censorship." The Court should grant the instant petition to prevent the suppression of negligently made false accusations of judicial misconduct.

The Ohio Supreme Court's "reasonable attorney" standard is overbroad in a third constitutionally significant way because it effectively diminishes the First Amendment rights of represented litigants in any court proceeding. Petitioner's client, Matthew Cirino, believes that his conviction was wrongfully affirmed by a biased court. Petitioner expressed his and his client's views in the motion for reconsideration. Of course, Mr. Cirino could not be

subjected to any civil or criminal sanction for expressing those same views himself absent a showing of actual malice under *New York Times*. Punishing a criminal defense attorney such as Petitioner for advancing his client's claims of judicial misconduct under a negligence standard will deter attorneys from making these claims. In turn, criminal defendants will be deprived of their First Amendment right to criticize the government in an effective manner, through an attorney trained in making legal arguments, and at a meaningful time, during the judicial proceedings. In short, any attorney, and especially a criminal defense attorney like Petitioner, should be permitted to say as much as his client can say when it comes to criticizing the government during a judicial proceeding.

Lastly, the "reasonable attorney" standard is overbroad because it prohibits speech concerning pending judicial proceedings without proof that the speech interfered with the administration of justice. *Gentile*, 501 U.S. 1030, 1075 (attorneys should refrain from speech that is substantially likely to interfere with the fair administration of justice). In *Pennekamp v. Florida*, 328 U.S. 331, 348-49 (1946), the Court explained:

> What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judge's inclinations or actions in these pending nonjury proceedings could not directly affect such administration. The criticism of their actions could not affect his ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings.

> For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.

Petitioner's accusations of bias and dishonesty did not adversely affect the administration of justice. Disciplinary Counsel found that there was no evidence to support the charge that Petitioner had interfered with the administration of justice. That charge was withdrawn. The dissent in *Gardner* reached the same conclusion. *Gardner*, 99 Ohio St. 3d at 434 (Pfeifer, J., dissent) ("Certainly, a motion for reconsideration would receive about as much scrutiny from the public if it were written on the wind.").

In sum, review is warranted in order to prevent the *Gardner* decision from chilling constitutionally protected speech.

II. Review Is Warranted Because The "Reasonable Attorney" Standard Adopted By The Ohio Supreme Court Is Not Narrowly Tailored To Promote A Compelling Government Interest

This Court's precedent establishes that laws abridging political speech may be upheld only to the extent that they are narrowly tailored to promote a compelling governmental interest. The *Gardner* Court held that attorneys may be disciplined for criticizing the judiciary under a less rigorous standard than would apply to non-lawyers in order to promote the "state's compelling interest in preserving public confidence in the judiciary[.]" *Gardner*, 99 Ohio St. 3d at 423.

However, bolstering or preserving public confidence in the judiciary is not a legitimate, let alone compelling, governmental interest. In *Bridges v. California*, 314 U.S. 252, 270-71 (1940), the Court explained:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind * * * on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Likewise, in *New York Times v. Sullivan*, 376 U.S. 254, 272-73, the Court stated:

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment . . . of criticism of the judge or his decision. This is true even though the utterance contains 'half-truths' and 'misinformation.' Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. (citations omitted).

Indeed, if preserving the public's confidence in the judiciary were a compelling state interest, laws prohibiting

truthful accusations of judicial misconduct could be passed without violating the First Amendment because truthful accusations of judicial misconduct would clearly erode the public's confidence in the judiciary more than false or unreasonable accusations. The First Amendment was not implemented to preserve the public's faith in government officials through enforced silences. On the contrary, the First Amendment promotes public confidence in the government and its officials through the unfettered dissemination of ideas.

In addition, the standard adopted by the Ohio Supreme Court is not narrowly tailored to meet the state's purported compelling interest in preserving the public's confidence in the judiciary. An attorney in Ohio may now be disbarred for "making accusations of judicial impropriety that a reasonable attorney would believe are false." But there is no factual basis to conclude that such unreasonable accusations of judicial misconduct would have any adverse impact upon the public's perception of or confidence in the judiciary. The Ohio Supreme Court cited no empirical data or study to support its assumption concerning the impact of such accusations. Logic leads to a different conclusion than the one reached by the Ohio Supreme Court. It is far more likely that accusations of judicial impropriety that a "reasonable attorney" would deem false will have no adverse impact upon the public's perception of the judiciary, particularly when every "reasonable attorney" could dispel any suspicions created by the unreasonable accusations with truthful speech. In short, more speech – not the suppression of speech – is adequate to advance the state's interest.

Conversely, an unreasonable accusation of judicial misconduct could adversely affect the public's perception of the judiciary only if the accusation were deemed credible

and believed by Ohio's citizens. Suppressing political speech because it may be believed by some segment of the public, however small that segment may be, removes important speech from the marketplace of ideas. The *Gardner* decision seems to be based upon the erroneous premise that non-attorneys are simply incapable of determining for themselves which ideas are worthy of belief when assessing accusations of judicial misconduct made by attorneys. Petitioner believes otherwise.

The Ohio Supreme Court also reasoned that attorney speech must more be rigidly circumscribed than those of other citizens because of an attorney's legal education and training. However, political speech cannot be regulated simply because it will be effective. *New York Times*, 376 U.S. at 273 ("Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations"); (*State ex rel. Oklahoma Bar Association v. Porter*, 766 P.2d 958, 968-69 (Okla. 1988) ("In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism[.]"). Thus, the Court has never articulated a First Amendment standard based upon the speaker's level of education or persuasiveness. The Court would surely reject the suggestion that a college graduate with a political science degree should be held to a different, more restrictive standard under the First Amendment. Likewise, the Court would surely find repugnant any suggestion that political pundits like Tim Russet or Rush Limbaugh must be more cautious in their public statements about government officials because of their education, years of experience and ability to persuade so many people. Lawyers should not be treated differently.

Bottom line, speech cannot be restricted simply because of the speaker's ability to persuade.

In sum, attorneys are in the best position to comment upon the official conduct of judges. Attorneys accusations of judicial misconduct should not be suppressed to protect or bolster the public's perception of the judiciary. The public should be allowed to decide for themselves which accusations about their elected government officials are true.

III. Review Is Warranted In Order To Uniformly Define The Parameters Of Protected Political Speech For Attorneys Under The First And Fourteenth Amendments

The Court has the "ultimate responsibility to define the limits of State power regarding freedom of speech[.]" *Wood v. Georgia*, 370 U.S. 375, 382 (1962). The First Amendment applies to all attorneys equally, but there is no uniform standard for determining the permissible manner in which an attorney can criticize the judiciary under the First and Fourteenth Amendments without being sanctioned or disbarred. *Gardner*, (noting varied approach and split among the states and federal circuit courts); *see also Florida Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001), *cert. den. sub nom., Ray v. Florida Bar*, 535 U.S. 930 (2002); *In re Topp*, 925 P.2d 1113 (Idaho 1997), *cert. den. sub nom., Topp v. Idaho Bar*, 520 U.S. 1155 (1997) (negligence standard); *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991), *cert. den. sub nom., Holtzman v. Grievance Committee for Tenth Judicial District*, 502 U.S. 1009 (1991) (applying an objective version of the actual malice standard); *In re Graham*, 453 N.W.2d 313, 320 (Minn. 1990) (applying an objective version of the actual malice standard).

Some state courts completely reject the actual malice standard adopted by the Court in *New York Times v. Sullivan*. Other courts purport to apply the actual malice standard in name only. The *Gardner* decision further diminishes the First Amendment rights of attorneys, requiring only a showing of negligence, and threatens to chill core political speech. Review of the Ohio Supreme Court's decision is warranted to protect the First Amendment from erosion.

CONCLUSION

The Court should grant this writ to decide whether and under what circumstances a state may discipline an attorney for accusing a judge of official misconduct. There is no uniform standard among the states or federal courts addressing this important constitutional question. Equally important, the "reasonable attorney" standard adopted by the Ohio Supreme Court in *Gardner* chills core political speech in order to promote an illegitimate state interest, the protection of the judiciary's reputation. At the very least, the writ should be granted to reverse and remand the decision in *Gardner*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF OHIO DECIDED AUGUST 13, 2003

SUPREME COURT, JANUARY TERM, 2003
[99 Ohio St.3d]

Opinion Per Curiam

OFFICE OF DISCIPLINARY COUNSEL v. GARDNER.

[Cite as *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048.]

Per Curiam.

Respondent, Mark J. Gardner of Cleveland, Ohio, Attorney Registration No. 0061172, was admitted to the practice of law in Ohio in May 1993. On August 13, 2001, relator, Disciplinary Counsel, filed a complaint charging respondent with several violations of the Code of Professional Responsibility, including DR 7-106(C)(6) (engaging in undignified or discourteous conduct which is degrading to a tribunal) and 8-102(B) (knowingly making a false accusation about a judge). A panel of the Board of Commissioners on Grievances and Discipline heard the matter and, based on stipulations and respondent's testimony, made findings of fact and conclusions of law and recommended a sanction.

The record establishes that in 2001, respondent appealed to the Court of Appeals for the Eighth District on behalf of a client convicted of driving under a court-ordered license suspension. Respondent challenged the conviction as a denial of due process, arguing that his client had not received sufficient notice of the crime with which he had been charged.

Appendix A

Respondent essentially acknowledged that his client was guilty of driving in violation of a court order; however, he maintained that the police officer had mistakenly charged his client with driving in violation of Ohio's Financial Responsibility Act ("FRA"), a crime of which his client was not guilty. The court of appeals affirmed the conviction.[1]

In a motion seeking reconsideration or, in the alternative, certification of the case as a conflict to this court, respondent accused the panel that decided his client's appeal of being dishonest and ignoring well-established law. He declared that the panel had issued an opinion so "result driven" that "any fair-minded judge" would have been "ashamed to attach his/her name" to it. He then added that the panel did not give "a damn about how wrong, disingenuous, and biased its opinion is."

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1. During the trial and appeal, respondent emphasized that the crimes of driving under a court ordered license suspension and driving under an FRA license suspension were different subsections of the general ordinance prohibiting driving under suspension. He argued that his client had actually been charged with the "wrong" crime because the charging officer had identified only the general ordinance on the client's ticket, the officer had described the suspension as "FRA," and the officer's trial testimony suggested that he had intended to charge the client with an FRA suspension violation. On the authority of *Barberton v. O'Connor* (1985), 17 Ohio St.3d 218, 17 OBR 452, 478 N.E.2d 803, paragraph two of the syllabus, the court of appeals held that the client was sufficiently charged because the general ordinance noted on the ticket allowed the client with "reasonable inquiry" to know exactly the charge against him. *Lakewood v. Cirino* (Feb. 1, 2001), Cuyahoga App. No. 78057, 2001 WL 91225, appeal not allowed (2001), 92 Ohio St.3d 1414, 748 N.E.2d 547.

Appendix A

Throughout the several pages that followed, respondent inveighed against the panel, contrasting it with "fair-minded Ohio appellate districts" and stating that "[n]o matter how bad [the] panel wants to skew or ignore the facts," it could only conclude that his client had been improperly charged. He lamented that "honesty and truth [were] damned" in the panel's opinion and that the panel's "desire to be 'tough on crime' [had] blind[ed] it to basic law and fairness." Respondent then posed these questions: "Why does this panel only apply the law as a hammer to crush citizens and not as a shield to protect their basic rights?" and "Is having a prosecutorial bent [so] hard to let go of that truth must be cast aside to achieve a particular result?"

Respondent went on to accuse the panel of having "distorted the truth" and having "manufactured a gross and malicious distortion." His discussion continued:

"Wouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense-necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?

"Is that claim that 'We are a nation of laws, not men' have any meaning after reading the panel's decision? Can't this panel have the decency to actually address-rather than to ignore—the cases cited by [the client] which demonstrate

beyond any doubt that he was convicted of an offense he was never charged with having violated?

"In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this court really encouraging all officers in the Eighth District to charge a generic statute—or Chapter or Title—and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? What is so difficult with a police officer doing his job in an intelligent manner? Why must this panel bend over backwards and ignore well established law just to encourage law officers to be slovenly and careless? In *State v. Homan* (2000), 89 Ohio St.3d 421 [732 N.E.2d 952], didn't the Ohio Supreme Court just state that officers actually have to follow the rules strictly? Doesn't that mean anything to this panel?

"Perhaps, if this panel is not strong enough to admit its obvious prosecutorial bias in its opinion, it will discover the internal fortitude to certify this matter to the Ohio Supreme Court under Rule IV of the Rules of Practice of the Supreme Court of Ohio."

The board's panel found, consistent with the parties' stipulation, that respondent had violated DR 7-106(C)(6). The panel also found respondent in violation of DR 8-102(B) by clear and convincing evidence.

In recommending a sanction, the panel considered that respondent had no previous record of discipline and had apologized for the manner in which he expressed his frustration about the affirmance of his client's conviction.

Respondent also recognized during the hearing that his response to the court of appeals' opinion was neither appropriate nor professional. However, while respondent professed to understand the need to challenge judicial decisions only in an appropriate manner, he confirmed his continued belief that the court of appeals during his client's appeal had skewed and ignored the facts, disregarded honesty and truth, and violated their oaths to decide cases fairly and impartially.

The panel recommended the sanction suggested by the parties—that respondent be publicly reprimanded for the cited misconduct. The board adopted the findings that respondent violated DR 7-106(C)(6) and 8-102(B), but rejected the panel's sanction. The board recommended, based on his "outrageous behavior toward a tribunal," that respondent be suspended from the practice of law for a period of six months, with all six months stayed on the condition that he commit no further violations of the Disciplinary Rules.

In objections, to the board's finding that he violated DR 8-102(B) and its recommendation, respondent argues that his accusations are federally protected free speech because they are opinions and thus immune from disciplinary measures in the same way that mere opinions are not actionable in defamation. He also argues that even if his attacks were capable of being proved true or false, relator nevertheless failed to prove that respondent knowingly made "false" accusations for the purpose of DR 8-102(B). We review these arguments to determine whether respondent's statements, which specifically accuse the appellate court panel of prosecutorial bias and corrupting

the law in order to sustain an unlawful conviction, may be disciplined as professional misconduct.

The First Amendment

The United States Supreme Court has held that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. * * * Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, 360 U.S. 622 [79 S.Ct. 1376, 3 L.Ed.2d 1473] (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. Nevada State Bar* (1991), 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888. See, also, In re Disciplinary Action Against Garaas (N.D.2002), 652 N.W.2d 918, 925. An attorney's speech may be sanctioned if it is highly likely to obstruct or prejudice the administration of justice. *Gentile* at 1075, 111 S.Ct. 2720, 115 L.Ed.2d 888. These narrow restrictions are justified by the integral role that attorneys play in the judicial system, which requires them to refrain from speech or conduct that may obstruct the fair administration of justice. Id. at 1074, Ill S.Ct. 2720, 115 L.Ed.2d 888.

Thus, attorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct. *In re Sawyer* (1959), 360 U.S. 622, 646, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (Stewart, J., concurring in result). The First Amendment does not shield an attorney from discipline for falsely suggesting "unseemly complicity" by the judiciary in unlawful or unethical

practices. Id. at 633, 79 S.Ct. 1376, 3 L.Ed.2d 1473. Such false statements, whether by attorneys or others, enjoy no constitutional protection when they are made with knowledge of their falsity or reckless disregard for their truth. *Garrison v. Louisiana* (1964), 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125. Although neither *Sawyer* nor in *In re Snyder* (1985), 472 U.S. 634, 105 S.Ct. 2874, 86 L.Ed.2d 504, definitively so held, all of the justices who participated in those decisions assumed or stated that a lawyer's false accusations of criminal conduct directed against named judges could be the basis for discipline. *In re Palmisano* (C.A.7, 1995), 70 F.3d 483, 487. "Even a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty." Id. at 487, citing *Milkorich v. Lorain Journal Co.* (1990), 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1. While *Milkovich* is a defamation case not involving attorney discipline, it demonstrates that the First Amendment does not protect any individual who knowingly makes false statements or expresses opinions that imply false statements of fact. *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211, 673 N.E.2d 1253.

Thus, the First Amendment does not insulate an attorney from professional discipline even for expressing an opinion, during court proceedings, that a judge is corrupt when the attorney knows that the opinion has no factual basis or is reckless in that regard. Respondent's contention that his statements are protected as unverifiable opinions is incorrect. *Milkovich* rejected the premise that the First Amendment mandates an inquiry into whether a statement is one of

opinion or of fact. Id. at 18-19, 110 S.Ct. 2695, 111 L.Ed.2d 1. Accordingly, the United States Constitution offers respondent no protection.

Section 11, Article I, Ohio Constitution

This court has never addressed the question of whether the Free Speech Clause of the Ohio Constitution, Section 11, Article I, forbids imposing discipline on an attorney for criticizing a judge during a pending court proceeding. DR 8-102(B) specifically permits such discipline where a lawyer knowingly makes a false accusation against a judge. Section 11 states:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech * * *."

The tension between Section 11 and DR 8-102(B) lies at the heart of this case. Under Ohio law, speech that may violate DR 8-102(B) may be otherwise protected by the state Constitution. When the statement in question cannot reasonably be interpreted by the ordinary reader as stating actual facts about an individual, the statement is protected as the free expression of opinion under Section 11. *Harper,* 77 Ohio St.3d at 229, 673 N.E.2d 1253; *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St.3d 139, 144, 729 N.E.2d 364. Thus, the Ohio Constitution goes beyond the federal Constitution in that certain false statements of opinion are protected. This protection exists as a separate and independent guarantee ancillary to freedom of expression and

requires a reviewing court to determine whether the language in question is fact or opinion. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 649 N.E.2d 182, certiorari denied (1996), 516 U.S. 1043, 116 S.Ct. 700, 133 L.Ed.2d 657; *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 117-118, 752 N.E.2d 962. The test for deciding whether a statement is fact or opinion is an objective one based on a totality of circumstances and on the specificity, verifiability, general context, and social context of the words used. Id. at 126, 752 N.E.2d 962; *McKimm,* 89 Ohio St.3d at 145, 729 N.E.2d 364.

In re Complaint Against Judge Harper, 77 Ohio St.3d 211, 673 N.E.2d 1253, employed this distinction to publicly reprimand a judge for airing a campaign advertisement that falsely accused her judicial opponent of being associated with dishonest lawyers intent upon corrupting the legal system. Although the *Harper* court did not explicitly apply the totality-of-circumstances test for distinguishing fact from opinion, the accusation in that case was sufficiently specific and weighed in favor of sanction. The advertisement in effect charged the judge's opponent with a crime—conspiring to fix cases.

To accuse a court of appeals of affirming a conviction out of prosecutorial bias and corruption is no less specific. Such allegations are charges of criminal or unethical activity and, therefore, constitute classic examples of statements having a well-defined meaning. *Wampler,* 93 Ohio St.3d at 128, 752 N.E.2d 962, citing *Ollman v. Evans* (C.A.D.C.1984), 750 F.2d 970, 979-980. Accord *Standing Commt. on Discipline, U.S. Dist. Court, Cent. Dist of Calif v. Yagman*

(C.A.9, 1995), 55 F.3d 1430, 1440 (statements that can reasonably be understood as imputing specific criminal or other wrongful acts are not entitled to constitutional protection merely because they are phrased in the form of an opinion). Allegations of criminal or ethical misconduct are also readily capable of being proved or disproved.

Moreover, allegations of corruption made in documents filed in court, unlike allegations raised in a political campaign, are not what the average reader would reasonably consider to be an opinion. A courtroom is not a forum for personal or political grandstanding, and the attorneys who practice in it "possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch of government" *State ex rel. Oklahoma Bar Assn. v. Porter* (Okla.1988), 766 P.2d 958, 969. Lawyers' statements made during court proceedings are "likely to be received as especially authoritative." *Gentile,* 501 U.S. at 1074, 111 S.Ct. 2720, 115 L.Ed.2d 888. Thus, in the context of his motion and that appeal, respondent's statements are reasonably understood to be factual assertions of the appellate court's corruption and prosecutorial bias.

Accordingly, we reject respondent's contention that his attacks against the court of appeals represented any sort of "rhetorical hyperbole" or "imaginative expression" for which he might escape sanction. *Harper,* 77 Ohio St.3d at 229; 673 N.E.2d 1253, quoting *Milkovich,* 497 U.S. at 20, 110 S.Ct. 2695, 111 L.Ed.2d 1. Nor could respondent's accusations be " 'loosely definable' " or " 'variously interpretable' " as his criticism of the law as applied by the panel. *Wampler,* 93 Ohio St.3d at 128, 752 N.E.2d 962, quoting *Ollman,*

750 F.2d at 980. Accord *In re Sawyer,* 360 U.S. at 634, 79 S.Ct. 1376, 3 L.Ed.2d 1473. Respondent charged with "crystal clarity," *Wampler,* 93 Ohio St.3d at 129, 752 N.E.2d 962, that the panel's affirmation of his client's conviction resulted not from error, but from prosecutorial bias and corruption. For this offense against the integrity and impartiality of the court of appeals and the judicial system, he may be held responsible. *Harper,* 77 Ohio St.3d at 229, 673 N.E.2d 1253.

Knowledge

DR 8-102(B) provides that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer." Respondent claims that this prohibition required relator to prove that his accusations of prosecutorial bias and corruption were false and that he subjectively knew that they were false. Relator urges us to apply an objective test.

Respondent advocates the "actual malice" standard applicable in defamation cases under *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984), 466 U.S. 485, 511, 104 S.Ct. 1949, 80 L.Ed.2d 502, fn. 30. At least three states have used the actual-malice standard in attorney discipline cases, that is, they have framed the issue as whether the lawyer uttered the statement with knowledge that the statement was false or with reckless disregard as to its truth. If no knowledge or recklessness is found, these courts have declined to discipline lawyers for accusing judges in public of bias. See *In re Green* (Colo.2000), 11 P.3d 1078, 1085; *Oklahoma Bar Assn. v. Porter*, 766 P.2d 958; *Ramsey*

v. Bd. of Professional Responsibility (Tenn.1989), 771 S.W.2d 116, certiorari denied (1989), 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed.2d 258. Similarly, in *Butler v. Alabama Judicial Inquiry Comm.* (Ala.2001), 802 So.2d 207, the court modified an overbroad judicial canon by incorporating the actual-malice test for judicial campaign speech.

We, however, agree with the majority of courts that have addressed this issue and adopt "an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or reckless disregard of its falsity." Annotated Model Rules of Professional Conduct (4th Ed.1999) 566, Rule 8. This standard assesses an attorney's statements in terms of " 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances' * * * [and] focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." *Yagman*, 55 F.3d at 1437, quoting *United States Dist Court, E. Dist of Wash. v. Sandlin* (C.A.9, 1993), 12 F.3d 861, 867. Accord *In re Chmura* (2000), 461 Mich. 517, 608 N.W.2d 31; *In re Disciplinary Action Against Graham* (Minn.1990), 453 N.W.2d 313, 321-322, certiorari denied sub nom. *Graham v. Wernz* (1990), 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41; *In re Westfall* (Mo.1991), 808 S.W.2d 829; 837; and *In re Holtzman* (1991), 78 N.Y.2d 184, 192-193, 573 N.Y.S.2d 39, 577 N.E.2d 30, certiorari denied sub nom. *Holtzman v. Tenth Judicial Dist. Grievance Commt.* (1991), 502 U.S. 1009, 112 S.Ct. 648, 116 L.Ed.2d 665.

"As the Court of Appeals of New York observed in *Holtzman, supra.*, at 192, 573 N.Y.S.2d 39, 577 N.E.2d 30, adopting a subjective standard would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth * * *.' The state's interest in protecting the public, the administration of justice, and the legal profession supports applying a different standard in disciplinary proceedings." *Chmura*, 461 Mich. at 543, 608 N.W.2d 31, quoting *Sandlin,* 12 F.3d at 867.

Yagman, 55 F.3d at 1437-1438, further explained why an "objective version" of the actual-malice test is permissible in the context of disciplinary proceedings:

"[T]here are significant differences between the interests served by defamation law and those served by rules of professional ethics. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice. See *In re Terry*, 271 Ind. 499 [502], 394 N.E.2d 94, 95 (1979); *In re Graham*, 453 N.W.2d 313, 322 (Minn.1990).

"Though attorneys can play an important role in exposing problems with the judicial system, *see Oklahoma ex rel. Oklahoma Bar Assn v. Porter*, 766 P.2d 958, 967 (Okla.1988), *false* statements impugning the integrity of a judge erode

public confidence without serving to publicize problems that justifiably deserve attention. * * * [A]n objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." (Emphasis added.)

We similarly conclude that the state's compelling interest in preserving public confidence in the judiciary supports applying a standard in disciplinary proceedings different from that applicable in defamation cases. Under the objective standard, an attorney may still freely exercise free speech rights and make statements supported by a reasonable factual basis, even if the attorney turns out to be mistaken. Accord *In re Chmura*, 461 Mich. at 544, 608 N.W.2d 31. Accordingly, we hold that an attorney may be sanctioned for making accusations of judicial impropriety that a reasonable attorney would believe are false.

Relator does not contest that it bore the burden of proof on this issue. Thus, we determine that a reasonable attorney would believe that respondent's accusations were false.

Respondent obviously disagreed with the court of appeals' analysis and disposition of his client's appeal. But as relator aptly points out, he made no real inquiry into the court's integrity at all prior to launching his attacks, even ignoring his law partner's advice against making the accusations of bias and corruption. A failure to investigate charges of judicial impropriety when EC 8-6 admonishes

attorneys to "be certain" that their criticism has merit demonstrates reckless disregard for truth. This is particularly true where, as here, the attorney proceeds against the advice of a close colleague in whom he has previously shown confidence.

Moreover, we have reviewed the court of appeals' opinion for evidence of bias and corruption and see nothing that could possibly be characterized as anything other than error, if that. Respondent simply assumed that the judges had conspired to defy their individual oaths to faithfully and impartially discharge the duties incumbent on their respective judicial offices to the best of their ability and understanding. R.C. 3.23. He thereby violated DR 8-102(B).

Sanction

We find respondent in violation of DR 7-106(C) and 8-102(B). We also find that his misconduct warrants a more serious sanction than that recommended by the board.

Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law. *Disciplinary Counsel v. West* (1999), 85 Ohio St.3d 5, 706 N.E.2d 760 (18-month suspension, 12 months stayed on conditions); *Columbus Bar Assn. v. Hartwell* (1988), 35 Ohio St.3d 258, 520 N.E.2d 226 (one-year suspension). Respondent is therefore suspended from the practice of law in Ohio for a period of six months. Costs are taxed to respondent.

Judgment accordingly.

Appendix A

MOYER, C.J., RESNICK, F.E. SWEENEY, BOWMAN and O'CONNOR, JJ., concur.

LUNDBERG STRATTON, J., concurs in part and dissents in part.

PFEIFER, J., dissents.

DONNA BOWMAN, J., of the Tenth Appellate District, sitting for COOK, J.

Appendix A

LUNDBERG STRATTON, J., concurring in part and dissenting in part.

I concur with the majority's judgment and most of its analysis. However, I do not believe that Section 11, Article I of the Ohio Constitution and DR 8-102(B) are in conflict because I do not believe that the Ohio Constitution protects "false statements of opinion."

The majority indicates that there is a conflict between DR 8-102(B) and Section 11, Article I of the Ohio Constitution because DR 8-102(B) prohibits "false accusations against a judge" while the Ohio Constitution protects "certain false statements of opinion." I believe that the Ohio Constitution protects opinions but not false statements of opinion.

In support of its position, the majority cites *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211, 229, 673 N.E.2d 1253, and *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St.3d 139, 144, 729 N.E.2d 364. The cited portion of *McKimm* merely holds that alleged defamatory statements must be examined from a reasonable reader's perspective to distinguish *fact* from *opinion.* In *Harper* we recognized that an opinion is often " 'rhetorical hyperbole,' " which cannot reasonably be interpreted as stating actual facts. *Harper,* 77 Ohio St.3d at 229, 673 N.E.2d 1253, quoting *Greenbelt Coop. Publishing Assn., Inc. v. Bresler* (1970), 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6.

I believe that a *false statement* of opinion connotes a deceitfulness that is absent in hyperbole. Accordingly, a distinction must be drawn between statements that may be

reasonably interpreted by the ordinary reader as stating actual facts about an individual versus statements that can reasonably be interpreted by the reader as a free expression of an opinion only of the author. See *Harper*, 77 Ohio St.3d at 229, 673 N.E.2d 1253; McKimm, 89 Ohio St.3d at 144, 729 N.E.2d 364. Stating that a "*false statement* of opinion" is protected by the Ohio Constitution precariously and unnecessarily blurs the line between a mere opinion, which is protected by the Ohio Constitution, and a false statement of fact, which is not always protected.

Accordingly, I believe that the better approach is to state that the Ohio Constitution protects opinions, but not false statements of opinion. Otherwise, I concur with the majority.

Appendix A

PFEIFER, J., dissenting.

In *Disciplinary Counsel v. Grimes* (1993), 66 Ohio St.3d 607, 614 N.E.2d 740, a case involving a lawyer who made an off-color reference about a judge to a newspaper reporter and a smart-aleck remark to another judge in court, I dissented from the majority's decision to impose a public reprimand. In *Grimes,* I wrote that the conduct at issue was out of character and inconsequential, but also that "[o]ur legal system relies upon vigorous advocacy, which occasionally leads to spirited interplay between lawyers and judges" and that we "ought not rule in a way that may affect that friction." 66 Ohio St.3d at 610, 614 N.E.2d 740.

I feel much the same way about the respondent in this case. By all accounts, his behavior was out of character. Certainly, a motion for reconsideration in an appellate court, while a public document, would receive about as much scrutiny from the public if it were written on the wind. The offending statements were between this attorney and the bench, and were presented in such a way that only the bench and opposing counsel would see them.

That being said, the disturbing thing about this case that separates it from *Grimes* is that the comments here were not made off-the-cuff in a moment of anger. They were written down, edited, and presumably checked for spelling. The attorney then made copies and filed his motion with the court. At any time he could have thought better of his comments and retracted them. It is a tried and true practice that the first thing a lawyer should do with a fiery pleading or letter is to file it under his or her pillow.

The respondent here did not do that, or if he did sleep on it, made a mistake in filing it with the court. He admits as much, and thinks he deserves a public reprimand. I agree, especially given the virtually nonpublic release of his comments.

* * * *

APPENDIX B — FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

Case No. 01-76

In Re:

Complaint against

Mark J. Gardner
Attorney Reg. No. 0061172

Respondent,

Office of Disciplinary Counsel

Relator.

Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

This matter was heard in Columbus, Ohio on April 24, 2002. The panel members were Bernard K. Bauer of Findlay, Ohio, Dale K. Perdue of Columbus, Ohio, and Jonathan Hollingsworth, Panel Chair, of Dayton, Ohio. None of the panel members resides in the district from which the complaint originated and none served on the probable cause

panel that reviewed and certified the complaint. Respondent, Marls J. Gardner, was represented by Charles W. Kettlewell & Associates, specifically, Charles W. Kettlewell and Charles J. Kettlewell. Jonathan Coughlan represented Relator.

PROCEDURAL BACKGROUND

On August 10, 2001, a Probable Cause panel of the Board of Commissioners on Grievances and Discipline certified to the Board the complaint of the Office of Disciplinary Counsel against Respondent. The complaint, as filed with the Board on August 13, 2001, was served on Respondent by certified mail return receipt on August 16, 2001. On September 5, 2001, Respondent moved and the Board granted him leave to October 5, 2001, in which to file his answer to Relator's complaint. On October 5, 2001, Respondent's counsel entered an appearance and requested an additional extension up to and including November 5, 2001, which was granted by the Board. On November 13, 2001, Respondent filed his answer. No objection was made to the late filing of the answer.

In the complaint, Relator alleged that Respondent's conduct violated Disciplinary Rules 1-102(A)(5) [engaging in conduct that is prejudicial to the administration of justice]; 1-102(A)(6) [engaging in conduct that adversely reflects on the lawyer's fitness to practice]; 7-106(C)(6)[engaging in undignified or discourteous conduct which is degrading to the tribunal]; and 8-102(B)f knowingly making a false accusation against a judge].

A substantial portion of this case was submitted to the panel based on joint stipulations of the parties filed with the

Board on April 24, 2002. In the joint stipulations, Relator withdrew the allegations relating to DR 1-102(A)(5) and DR 1-102(A)(6) on the basis that it could not make its evidentiary burden. Respondent stipulated to a violation of DR 7-106(C)(6). The matter left for determination by this panel was whether Respondent's conduct violated DR 8-102(B) and the appropriate sanction for findings of misconduct. A copy of the joint stipulations is attached hereto and incorporated herein by reference as if fully rewritten.

FINDINGS OF FACT

On May 17, 1993, Respondent was admitted to the practice of law in Ohio. At the time of the conduct involved in this matter, Respondent had been practicing law for approximately eight (8) years and had acquired a reputation as a very good lawyer on Ohio's traffic laws. A frequent lecturer on this topic in Ohio, Respondent appears to have earned the recognition from his peers for his knowledge on the subject and his tenacity for championing his clients' causes. It is the over zealous manner in which he championed the cause of one client that brought Respondent before this Board.

Respondent represented Matt A. Cirino at the trial level and before the Eighth District Court of Appeals in *City of Lakewood v. Cirino*, No. 78057, Feb, 1, 2001. Mr. Cirino appealed his conviction on one count of driving while under a Financial Responsibility Act ("FRA") suspension in violation of Lakewood Codified Ordinance 335.07. The conviction was based on the following facts.

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On April 18, 2000, Cirino was pulled over by a City of Lakewood police officer after he was observed running a red light. The police officer checked Cirino's driving privileges via a LEADS report which, at that time, did not indicate that Cirino's license was suspended because of his failure to comply with Olio's FRA. However, the LEADS report did indicate a court suspension. When the officer issued the traffic citation, he listed the City of Lakewood Codified Ordinance's numerical designation of "Section 335.07" without further identifying by alphabetical reference any of the five subsections of the ordinance. However, under the heading of "Suspension Type," the officer wrote the phrase: "FRA 4-27-99 - 4-27-02."

At the criminal trial on April 18, 2000, Respondent argued that since Cirino's driver's license was not under an FRA suspension at the time of his arrest and citation, his client must be found not guilty. Although the Lakewood Municipal Court acknowledged "that the ticket was on the FRA suspension," the trial court nevertheless found Cirino guilty of driving while under suspension and one count of failure to obey a traffic control device.

In his appellate brief, Respondent argued constitutional violations, asserting that since the traffic citation charged his client with having violated the FRA suspension provision, that the trial court was prohibited from finding him guilty of a different, uncharged type of suspension. The Eighth District Court of Appeals upheld the conviction. In its opinion, the appellate court stated that since the officer did not list any particular subsection of the Lakewood Ordinance on the citation, the trial court was free to convict Cirino on the

court-ordered suspension. Respondent filed a motion for reconsideration of the appellate decision. In his motion for reconsideration, Respondent asserted that the appellate court panel that ruled on the Cirino appeal was dishonest and ignored well-established law. He went on to say that the panel's opinion was so result driven that "any fair-minded judge should be ashamed to attach his/her name to [it]." He accused the panel of "not giving a damn about how wrong, disingenuous and biased its opinion was." Although Respondent contended that many of his remarks were taken out of context, the following statements are representative of his attack on the appellate court and his opinion of the panel:

a. not being fair-minded;

b. seeking to skew or ignore the facts;

c. disregarding honesty and truth;

d. being blind to basic law and fairness;

e. only applying the law as a hammer to crush citizens and not as a shield for their basic rights;

f. casting aside the truth to achieve a particular result;

g. distorting the truth;

h. manufacturing a gross and malicious distortion;

i. lacking in basic decency and honesty;

j. writing an opinion that failed to reflect the truth;

k. trying to achieve as a particular result the affirmance of a wrongful conviction;

l. corrupting the law and the truth;

m. failing to abide by their oath to uphold and follow the law;

n. bending over backward and ignoring well establish (sic) law just to encourage law enforcement officers to be slovenly and careless; and

o. having an obvious prosecutorial bias.

Respondent also invoked the name of God in making his accusations against the appellate panel:

In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this Court really encouraging

> all officers in the Eighth District to charge the generic statute — or chapter or title — and not the particular offense they are accusing a citizen of violating? In the name of God, WHY?

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CONCLUSIONS OF LAW

Based on the foregoing facts, Relator initially charged Respondent with violating Disciplinary Rules I-102(A)(5) [engaging in conduct that is prejudicial to the administration of justice]; I-102(A)(6) [engaging in conduct that adversely reflects on the lawyer's fitness to practice]; 7-1066(C)(6) [engaging in undignified or discourteous conduct which is degrading to the tribunal]; and 8-102(B)[knowingly making a false accusation against a judge]. However, Relator withdrew and the panel accepted the withdrawal of the allegations of a violation of DR 1-102(A)(5) and DR 1-102(A)(6). Therefore, the panel recommends a dismissal of the allegations relating to DR 1-102(A)(5) and DR 1-102(A)(6) on the basis that Relator has failed to prove said violations by clear and convincing evidence.

Based on the findings of fact and the joint stipulation of the parties, this panel finds that Relator has proven by clear and convincing evidence that Respondent's conduct constitutes a violation of DR 7-106(C)(6) and DR 8-102(B).

MITIGATION

Respondent is in good standing, cooperated fully with Relator and has no other grievances against him. Moreover, Respondent has expressed remorse for the manner in which he chose to vent his frustrations about the adverse result for his client, including writing a letter of apology to the appellate panel. However, and despite his recognition of the need to appropriately challenge judicial decisions, Respondent continues to believe that he was right about the legal

arguments made in the Cirino natter. This attitude casts a shadow over the genuineness of Respondent's expression of remorse for the mariner in which he vented toward the appellate court.

RECOMMENDATION

Relator and Respondent stipulate to a public reprimand for the admitted violation. Finding no reason to oppose same, this Panel adopts the recommended sanction of a public reprimand.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 9, 2002. The Board adopted the Findings of Fact and Conclusions of Law. The Board, however, recommends that, based on the Respondent's outrageous behavior toward a tribunal, the Respondent, Mark J. Gardner, be suspended from the practice of law in the State of Ohio for a period of six months, with all six months stayed on the condition of no further violations. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

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s/ Jonathan W. Marshal
JONATHAN W. MARSHAL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

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* * *

JOINT STIPULATIONS

Now come relator, Disciplinary Counsel, and respondent, Mark Gardner, who hereby stipulate and agree to the following facts and exhibits for submission to the panel:

1. Respondent, Mark J. Gardner, was admitted to the practice of law in the state of Ohio on May 17, 1993.

2. Respondent is subject to the Rules for the Government of the Bar and Code of Professional Responsibility.

3. Respondent represented Matt A. Cirino at the trial level and before the Eighth District of Court of Appeals in *City of Lakewood v. Cirino,* (No. 78057; Feb. 7, 2001). Mr. Cirino appealed his conviction on one count of Driving While Under a Financial Responsibility Act (FRA) Suspension, in violation of Lakewood Codified Ordinance 335.07. (Exhibit A)

4. On April 18, 2000, Cirino was pulled over by a City of Lakewood police officer after he was observed running a red light.

5. The Lakewood officer checked Cirino's driving privileges via a LEADS report, which, at the time, did not indicate that Cirino's license was suspended for his failure to comply with Ohio's FRA. However, the LEADS report did list a court suspension. (Exhibit B)

6. The traffic citation (charging instrument) issued to Cirino listed the City of Lakewood Codified Ordinance numerical designation of "§335.07" without further alphabetically identifying any particular subsection of the five available. In the preprinted portion of the ticket labeled "Suspension Type," the arresting officer wrote the phrase, "FRA 4-27-99 — 4-27-02." (Exhibit C)

7. At the trial on April 18, 2000, respondent argued that since Cirino's driver's license was not under an FRA suspension at the time of his arrest, his client must be found Not Guilty. Although the Lakewood Municipal Court acknowledged "that the ticket was on the FRA suspension" (Exhibit D, Trial Transcript p. 19), the trial court, nevertheless found Cirino guilty of a driving while under suspension and one count of failure to obey a traffic control device.

8. In his appellate brief respondent asserted, based upon notice, due process issues, and case law, that since Mr. Cirino's citation charged him with having violated the FRA suspension provision that the trial court was prohibited from finding him guilty of a different, uncharged type of suspension.

9. The conviction was upheld by the Eighth District Court of Appeals. In its opinion the Eighth District Court of Appeals stated that since the officer did not list any particular subsection [(a), (b), (c), (d), or (e)] of Ordinance § 335.07 on the charging document, the trial court was free to convict Cirino on the court-ordered suspension. (Exhibit E)

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10. After the decision by the Eighth District Court of Appeals, respondent filed a motion for reconsideration, or in the alternative, to certify a conflict to The Ohio Supreme Court. (Exhibit F)

11 Respondent's motion asserted, in general, and sometimes specific terms, that the Eighth District Court of Appeals panel (hereinafter "panel") was dishonest and ignored well-established law, and the panel's opinion was so result driven that "any fairminded judge should be ashamed to attach his/her name to [it]."

12. Respondent accused the panel of "not giving a damn about how wrong, disingenuous and biased its opinion was."

13. Respondent's motion for reconsideration (Exhibit F) is the best evidence and speaks for itself, but to summarize, it contains the following statements with respect to the panel's decision;

(a) not being fair-minded;

(b) seeking to skew or ignore the facts;

(c) disregarding honesty and truth;

(d) being blind to basic law and fairness;

(e) only applying the law as a hammer to crush citizens and not as a shield for their basic rights;

(f) casting aside the truth to achieve a particular result;

(g) distorting the truth;

(h) manufacturing a gross and malicious distortion;

(i) lacking in basic decency and honesty;

(j) writing an opinion that failed to reflect the truth;

(k) trying to achieve as a particular result the affirmance of a wrongful conviction;

(l) corrupting the law and the truth;

(m) failing to abide by their oath to uphold and follow the law;

(n) bending over backward and ignoring well establish (sic) law just to encourage law enforcement officers to be slovenly and careless; and

(m) having an obvious prosecutorial bias.

14. Respondent's motion further stated:

In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a

policy matter, is this Court really encouraging all officers in the Eighth District to charge the generic statute — or chapter or title — and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? citing thereafter to State *v. Homan* (2000) 89 Ohio St.3d 421. (Exhibit F)

MITIGATION AND AGGRAVATION

15. Respondent submits the following factors in mitigation: (a) absence of prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) full and free disclosure to disciplinary Board and cooperative attitude toward proceedings; and (d) character and reputation testimony and letters to be submitted at hearing. (Exhibit G) Respondent admits that portions of his motion were grossly excessive and should never have been published, for which he apologizes.

16. There are not aggravating factors.

VIOLATIONS

17. Relator withdraws the allegations of violations DR 1-102(A)(5) and DR 1-102(A)(6). Relator and respondent agree and stipulate respondent's conduct was in violation of DR 7-106(C)(6) [engage in undignified or discourteous conduct which is degrading to the tribunal.

18. Relator's allegation that respondent's conduct also violated DR 8-102(8) [knowingly making a false accusation against a judge] remains outstanding.

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SANCTION

19. Relator and respondent agree and stipulate that the appropriate sanction is a public reprimand. Should the panel find respondent's conduct also violated DR 8-102(8) relator and respondent stipulate that the appropriate sanction is a public reprimand.

STIPULATED EXHIBITS

Exhibit A	Mr. Cirino's August 18, 2000 appeal of his conviction of Ordinance 335.07
Exhibit B	LEADS Report
Exhibit C	Traffic ticket charging driving while suspended in *Lakewood v. Cirino*
Exhibit D	April 18, 2000 City of *Lakewood v. Matt A. Cirino* Trial Transcript
Exhibit E	Eighth District Court of Appeals Journal Entry and Order upholding Mr. Cirino's conviction
Exhibit F	Mr. Gardner's February 5, 2002 Motion for Reconsideration, or in the Alternative, to Certify a Conflict to the Supreme Court
Exhibit G	Respondent's Character Letters

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CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 24 day of April, 2002.

Respectfully submitted,

CHARLES W. KETTLEWELL & ASSOCIATE

s/ Charles Kettlewell
Charles W. Kettlewell (0016120)
Charles J. Kettlewell (0072448)
150 East Wilson Bridge Road, Suite 200
Worthington, Ohio 43085
(614) 436-2750
(614) 436-2865—Fax
Counsel for Respondent, Mark J. Gardner

s/ Mark J. Gardner
Mark J. Gardner (0061172)
Gardner and Kucharski
526 Superior Avenue, Suite 1130
Cleveland, Ohio 44114

Respondent

OFFICE DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO

s/ Jonathan E. Coughlan
Jonathan E. Coughla (0026424)
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Relator

APPENDIX C — RECONSIDERATION ENTRY OF THE SUPREME COURT OF OHIO, DENIED ON OCTOBER 8, 2003

THE SUPREME COURT OF OHIO

Case No. 02-1461

Disciplinary Counsel,

Relator,

v.

Mark J. Gardner,

Respondent.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

s/ Thomas J. Moyer
Thomas J. Moyer
Chief Justice

APPENDIX D — MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE, TO CERTIFY A CONFLICT TO THE OHIO SUPREME COURT IN THE COURT OF APPEALS FOR THE EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO DATED FEBRUARY 9, 2001

IN THE COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

APPEALS COURT NO. 78057

CITY OF LAKEWOOD

Plaintiff-Appellee

-vs-

MATT A. CIRINO,

Defendant-Appellant

MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE, TO CERTIFY A CONFLICT TO THE OHIO SUPREME COURT

Now comes Defendant-Appellant, by and through undersigned counsel, and moves this panel to reconsider its opinion issued on February 1, 2001, or in the alternative, to certify a conflict between this panel's opinion and that rendered by another district to the Ohio Supreme Court.

The basis of this motion is that this panel's opinion is not only illogical, it is also dishonest. It is dishonest in that

not only is well-established law being ignored, but also in its recitation of the facts, and more significantly, the facts omitted from the opinion. It is the most result-driven opinion this attorney has ever read. It is an opinion that any learned fair-minded judge should be ashamed to attach his/her name to.

I don't imagine this panel gives a damn about how wrong, disingenuous and biased its opinion is. But there is indisputably a conflict between this panel's opinion and that of Clark County Court of Appeals case of *State v. Jackson* (1992), 78 Ohio App.3d 479, where the 2nd District ruled that a *de facto* amendment from "driving under a court suspension" in violation of R.C. §4507.02(D)(1) to "driving without paying a reinstatement fee" in violation of R.C. §4507.02(C) was improper and illegal.

Furthermore, this panel should – at this point in their collective legal careers – understand that the UTT (also know as a traffic ticket) is the charging document in all traffic matters. According to the law – at least in fair-minded Ohio appellate districts where this panel does not sit – the UTT is the charging document that is supposed to place Defendants on notice of exactly what offenses they have been accused of having violated.

No matter how bad this panel wants to skew or ignore the facts of this case, there is no question – no question – that Mr. Cirino was charged with DUS-FRA and running a traffic light. Why is there no question? Because that's what the ticket said!! Imagine that, the traffic ticket (i.e., charging document) actually says that!! Isn't that good enough for this panel?

Appendix D

The officer completing the traffic ticket actually wrote down "Red Light" and "FRA 4-27-99 → 4-27-02." He also wrote down that he was charging Mr. Cirino with just two offenses. Not three! Not four! Not all five of the DUS offenses listed under L.C.O. §335.07. Or perhaps this panel actually "honestly" believes that Mr. Cirino was charged with six offenses, the five that are listed under L.C.O. §335.07 and the red light offense? The officer did not write on the ticket (i.e., did not allege) that Mr. Cirino with driving under a court suspension. Honestly. Read the traffic ticket issued to Mr. Cirino. Or doesn't this panel care about this fact?

Well then, exactly what type of DUS offense did Mr. Cirino reasonably believe he was charged with having violated? Could it possibly be the one that was spelled out for him on the ticket by the arresting officer, i.e., FRA 4-27-99 → 4-27-02?, and that he was actually prosecuted for (but not convicted of)? No. Banish the thought. Actually reading the words written by the charging officer on the ticket to see what offense you're charged with would have been both stupid and dishonest of Mr. Cirino. Right? Isn't that this panel's legal theory?

Apparently, according to this esteemed panel, actually reading the plain English written on the traffic ticket would constitute unreasonable and perhaps even irrational action. Better that Mr. Cirino would have pulled out dice and assigned various uncharged offenses to each number (1 = murder; 2 = DUI, 3 = sexual imposition, etc) and just roll it. Whatever number comes up, best three out of five, that's the offense Mr. Cirino will defend himself on. Charging document be damned!! Explicit language be damned. Honesty and truth be damned. After all, a traffic ticket is just

a bunch of letters, words and numbers strewn together that does not mean anything. Right?

Mr. Cirino, as well as defense counsel, knew that he was charged with DUS-FRA, and not DUS-Court Suspension. It said so on the traffic ticket. The arresting officer knew he was charging Mr. Cirino with DUS-FRA, which is why he wrote under Type of Suspension, "FRA: 4-27-99 → 4-27-02." This fact is born out from his testimony. The prosecutor likewise knew he was prosecuting a DUS-FRA case, that's why in his direct examination of the officer he presented evidence *exclusively* addressing Mr. Cirino's FRA situation. In fact, the prosecutor actually admitted that Mr. Cirino was in fact charged with DUS-FRA at oral argument before this panel!! Of course, this fair and non-prosecutorial minded panel ignored that quote, but was able to summon up the courage to quote defense counsel that "if [Mr. Cirino] was charged under driving under a court suspension, there's little doubt he would be found guilty." How fair. How completely neutral and just of this panel. And by the way, even the trial judge knew that Mr Cirino was charged with DUS-FRA, which is why he said on the record, "The ticket was on a FRA suspension." (Trial transcript page 19, lines 22 &23) So why in the name of truth and decency can't this panel acknowledge what everyone else knows is the simple unquestionable truth? Mr. Cirino was charged with a DUS-FRA and not a DUS-Court Suspension. Is this panel's desire to be "tough on crime" blinding it to basic law and fairness? Why does this panel only apply the law as a hammer to crush citizens and not as a shield to protect their basic rights? Is having a prosecutorial bent that hard to let go of that the truth must be cast aside to achieve a particular result?

Appendix D

This panel distorted the truth – yes, it manufactured a gross and malicious distortion – when it wrote "In the present case, contrary to the assertion of the appellant, the appellant was not charged with a violation of section 335.07(a) of the Lakewood Codified Ordinances." This panel knows – as does everyone else associated with this case – what Mr. Cirino was charged with. Or perhaps this panel is now sanctioning police officers charging citizens with a violation of "Chapter 4511." Why specify what the offense is? Let the accused do all the work. Right? That makes good sense. It's also fair, right? Check the "satisfied" box on the Due Process and Notice requirements. Better yet, all officers should now just write on the UTT that a violation of "Title 45" occurred. That's the way to do it. Right?

Wouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result – upholding a wrongful conviction of a man who was unquestionable guilty of an uncharged offense – necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?

Is that claim that "We are a nation of laws, not men" have any meaning after reading this panel's decision? Can't this panel have the decency to actually address – rather than to ignore – the cases cited by Mr. Cirino which demonstrate beyond any doubt that he was convicted of an offense he was never charged with having violated?

Appendix D

In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this court really encouraging all officers in the Eighth District to charge the generic statute – or Chapter or Title – and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? What is so difficult with a police officer doing his job in an intelligent manner? Why must this panel bend over backwards and ignore well established law just to encourage law enforcement officers to be slovenly and careless? In *State v. Homan* (2000), 89 Ohio St.3d 421, didn't the Ohio Supreme Court just state that officers actually have to follow the rules strictly? Doesn't that mean anything to this panel?

Perhaps, if this panel is not strong enough to admit its obvious prosecutorial bias in its opinion, it will discover the internal fortitude to certify this matter to the Ohio Supreme Court under Rule IV of the Rules of Practice of the Supreme Court of Ohio.

Ever So Respectfully Submitted,

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APPENDIX E — LETTER FROM JUDGE KENNETH R. SPANAGEL TO CHARLES W. KETTLEWELL

JUDGE KENNETH R. SPANAGEL
PARMA MUNICIPAL COURT
5555 POWERS BOULEVARD
PARMA, OHIO 44134
440-887-7473

Mr. Charles W. Kettlewell
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio 43085

Re: No. 01-76 – Disciplinary Counsel, Relator
vs. Mark J. Gardner, Respondent

Dear Mr. Kettlewell:

I am writing you this letter pursuant to the subpoena received by me to provide character information to the Board of Commissioners with regard to the above-captioned matter. I am aware of the constraints which I, as a Judge, am permitted to write such letters and do so pursuant to the subpoena. I was aware of the Motion filed by Mr. Gardner as well as the Decision in Eighth District Case Number 78057 prior to my being made aware of these disciplinary proceedings. I am aware that this letter may be reviewed by the Board of Commissioners with regard to Mark's disciplinary proceeding.

I am not sure how many years I have known Mark, but it would have to be somewhere between 6 to 10 years. I have known Mark as a defense and plaintiff's lawyer in my Court,

as well as a student in CLE that he teaches, as well as jointly teaching with him on CLE on a wide range of topics of traffic law. I also know of Mark through his work as an expert where he has testified in my Court on alcohol related traffic violations, as he has been trained in the NHTSA Field Sobriety Tests. His dedication to the law and justice is one of the highest I've seen in any lawyer I have known either personally or professionally in my 27 year legal career. Some of this, I believe, stems from heritage and the upbringing of his family, with a strong sense of the rightness of the law and government. I believe Mark is before the Board of Commissioners at this time because of the zeal that he has for the law and what he believes to be right.

As a 15 year Judge with experience in traffic law, a teacher of traffic law across the State and as one of the primary designers of the UTT Ticket Form, which was the prime subject matter of the Appellate Case, I think that I am highly knowledgeable as to the facts of the Appellate Case. I have read the Decision, even before any disciplinary proceedings were commenced. Although I am restricted in my own ability to comment as to Judicial Decisions, it is my personal opinion that the Decision made by the Court of Appeals was wrong and I certainly would, at a minimum, have written a strong dissent. This is not to either praise or condemn Mark for the language of his Motion; I realize the Members of the Board of Commissioners must focus more on Mark's conduct as opposed to the underlying reason for the conduct, but I would suggest that the Board might first look at the original case, the Appellate Decision, and perhaps examine the law themselves as to whether or not they feel the Appellate Decision was correct. I think this may be

important to give the members of the Board some perspective as to where Mark stood as a lawyer. There is no question that his comments in the Motion were both zealous and inflammatory; the question before the Board is whether or not his actions rise to a violation of the Disciplinary Rules, which I know Mark holds in the highest regard and deeply respects.

I have inquired of the Board and have learned from their office the four specific Disciplinary Rules which he is alleged to have violated. To the extent that I would render my own opinion of Mark's conduct, I wish to comment based upon each particular rule. I believe that his conduct was not prejudicial to the administration of justice under DR 1-102(A)5. Certainly his comments, though inflammatory, did not effect the outcome of the Appellate Decision, as the Motion was a Post Ruling Motion. Although I think Mark realized that a Motion for Reconsideration might not be granted, his Motion for a Certification of Conflict to the Supreme Court appears to have, at a minimum, merit for consideration by the panel. Perhaps as to this Rule the best adage might be that Mark sought an appropriate relief for his client, but the words he used in going about it were not the appropriate way to do it. The key question would be, were his words prejudicial to the administration of justice? Regardless of the language, the Appellate panel had three options presented to it — grant reconsideration, certify a bona fide conflict, or deny the Motion in total. If anything, Mark's language could be considered as being prejudicial to his client, to the extent that they would anger the members of the panel. However, I believe that Mark, although upset with the Court's Ruling, did it in a manner which was appropriate, although his language was extreme.

Appendix E

As to the allegations regarding DR 1-102(A)6, I do not think that in any way Mark's conduct in any way adversely reflects on his fitness to practice law. Mark's record as a lawyer, teacher, prosecutor, judicial candidate, and person reflect in his entire legal career, not only his fitness to practice, but his superior commitment to the practice of law. My opinion is that this is an example of a situation which we have all faced as practitioners, that being unhappy with a Decision of a Court, and in this situation, outraged at what he felt what was a major incorrect Decision. Like any of us, we could confine our frustration to the corridors of the Courthouse, complaining at a cocktail hour, or privately complaining to fellow lawyers behind closed doors. Would any of those actions serve the benefit of his client, to which he still owes a duty to engage in the best legal work for his client? I do not think so. I do not think Mark should be applauded for his approach to the Court regarding a Decision unfavorable to him. He did, however, take the appropriate legal step by filing the appropriate Motion. It would be my opinion the best way to contemplate whether or not Mark violated this rule would be to place any one of us into his shoes and for us to consider what would have been the most appropriate action to take to represent our client zealously.

Mark is also charged with a violation of DR 7-106(C) (et. seq.), Although DR refers to undignified or discourteous conduct, I will accept that the language in a Motion could constitute conduct within the realm of this Rule, although the flow of DR 7-106 it would appear to relate more to conduct as opposed to language. I have seen Motions and Briefs at times which certainly raise inflammatory language between parties and counsel, but have not seen previous

situations where inflammatory statements were directed to the Court. If in fact those words were undignified or discourteous, I again think it is necessary to understand the frustrations which Mark may have had to this particular Decision. In all of the time I have known Mark, I have never seen him at any time demonstrate anything other than a deepest respect for all judicial persons and proceedings. I have seen Mark's zeal in the defense of his clients and the passion with which he takes client's cause, especially when he sees a need for justice to be done. In every case that Mark has had before my Court, I have been impressed by his professionalism and his thoroughness in the criminal justice process, as compared to many lawyers before my Court who seem more result driven to resolve a case as quickly and reasonably as possible and move on, even where a legitimate issues that could have been raised for their clients that were not. The language of his Motion was perhaps discourteous, but they reflected Mark's own frustration in a Decision he felt was wrong.

As to the last alleged violation, under DR 8-102(B), although Mark's language was inflammatory, and I'm sure offensive to the panel, I do not believe his comments were intended or meant to make any accusations to a Judge. His comments, though less than appropriate, did not accuse any one of the Judges of any wrong doing or violation of either the Code of Judicial Conduct or the Ethical Considerations or Disciplinary Rules we all follow as lawyers. As I stated earlier in this letter, although Mark probably should not have made the comments he did, I know Mark well enough to know that Mark is not a person who routinely or regularly flies off the handle, or makes disparaging remarks to either

lawyers of the Court regarding other lawyers or members of the judiciary. Although I have never heard him practice before an Appellate body, I know of his arguments both in Appellate Courts and the Supreme Court where his professionalism and preparation demonstrate his fitness to practice law.

As I stated earlier, there are very few lawyers I know or have known who I have been more impressed with than Mark's commitment to the justice system, the practice of law, and the interest of his clients. Since the potential of sanction may range from no sanction to disbarment, this is a very serious proceeding, and I take the writing of this letter very seriously. For the Board of Commissioners to recommend any sanctions to the Supreme Court that would limit or affect Mark's continuing right to practice law would be a disservice to the practice of law and the citizens of this State. As a prosecutor, Mark ensures that criminal justice is served on behalf of the State in the jurisdiction in which he serves as prosecutor. As a practitioner, Mark serves the interest of many Defendants, some of who probably cannot afford the high level of representation which he gives, but which he does so in every case. As a teacher, Mark shares knowledge with lawyers across the State for their individual improvements in their own individual practices. Mark has a total commitment to the practice of and the betterment of justice in this State. I would hope that the Board of Commissioners considers all of these factors when weighing their deliberations and their determination of the case.

In the event that you have any further questions, you may feel free to contact me at 440-887-7473.

Appendix E

Very truly Yours,

s/ Kenneth R. Spanagel
Judge Kenneth R. Spanagel
Parma Municipal Court